

*a***SWEDISH MOTOR ASSEMBLIES SDN BHD****v.****HJ MD ISON BABA***b*

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-04-59-1997]
15 JANUARY 1998

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ADMINISTRATIVE LAW: *Exercise of judicial powers - Certiorari - Whether High Court may use certiorari proceedings to entertain appeal against findings of fact - Exceptions to the rule - Consideration of William Jacks & Co (M) Sdn Bhd v. S Balasingam*

d

LABOUR LAW: *Industrial Court - Technical rules - Estoppel - Waiver - Acquiescence - Whether should be used by Industrial Court - Whether use of technical rules by Industrial Court amounts to an error of law*

e

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Quashing award of Industrial Court - Whether proper or useful to remit case to Industrial Court for rehearing - Delay - Whether judge conducting judicial review entitled to make a finding - Whether Court of Appeal entitled to make a finding*

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The instant appeal was brought against an order of the High Court whereby *certiorari* was issued quashing an award of the Industrial Court. According to the facts, the respondent was at all times employed by the appellant as a product and maintenance manager. By a letter dated 1 August 1992, the appellant purported to terminate the respondent's services by giving him three months' notice. Later on 15 October 1992, the parties entered into a written agreement under which the respondent resigned from the employment of the appellant. Later the respondent however took the position that he had not voluntarily resigned but had been dismissed without just cause or excuse. He then made representations to the Director General of Industrial Relations. They were subsequently referred by the Minister to the Industrial Court for adjudication and the Industrial Court after hearing evidence, dismissed the

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respondent's claim. The Industrial Court concluded that since the respondent had signed the agreement on his own accord, he was now estopped from saying that he signed it under duress.

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The respondent being dissatisfied with the award made against him applied for an order of *certiorari* to quash it and for mandamus to have the matter remitted to the Industrial Court for a re-hearing. The judicial commissioner allowed the application – stating that the Industrial Court had erred by invoking the doctrine of estoppel against the respondent. Counsel argued that the judicial commissioner had exceeded the role assigned to him in judicial review proceedings. He submitted that a court hearing *certiorari* is not entitled to exercise appellate power.

Held:

Per Gopal Sri Ram JCA

[1] The present case did not fall within the restrictive purview of the principle that a court cannot utilise *certiorari* proceedings as a cloak to entertain an appeal against findings of fact. In fact this case fell within the exception to the rule – ie: (a) where reliance upon erroneous factual conclusion may itself offend against the principles of illegality or irrationality; (b) where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at. On the facts of the present case, the judicial commissioner embarked on an inquiry which he was entitled to do. This was not a case where *certiorari* was used to cloak the exercise of appellate power.

[2] The Industrial Court should adjudicate upon the representations referred to it without referring to technical rules such as estoppel, waiver and acquiescence. In the present case, the Industrial Court did resort to the doctrine of estoppel to preclude the respondent from asserting that he had been dismissed without just case or excuse. The judicial commissioner was accordingly correct in holding that the award of the Industrial Court contained an error of law to this extent.

[3] If the order to remit and rehear the case was permitted to stand, a further delay would be occasioned which would be contrary to the intention of Parliament that there should be speedy resolutions to industrial disputes. This would therefore be an appropriate case to vary the order made by the judicial commissioner.

[4] In finding the Industrial Court's conclusion on the facts to be perverse, the judicial commissioner would have been entitled to proceed to make a specific finding that the respondent had been dismissed without just cause or excuse. This court was equally inclined to do just that.

[Appeal dismissed; order remitting case to Industrial Court set aside; case remitted to Industrial Court for determination of remedy to be awarded.]

a [Bahasa Malaysia Translation of Headnotes]

- b* Rayuan ini dibawa terhadap perintah Mahkamah Tinggi di mana suatu *certiorari* telah diberikan membatalkan award Mahkamah Perusahaan. Menurut fakta, responden selama ini telah digajikan oleh perayu sebagai pengurus produk dan penjagaan. Menurut surat bertarikh 1 Ogos 1992, perayu telah menamatkan perkhidmatan responden dengan memberikannya notis tiga bulan. Selanjutnya pada 15 Oktober 1992, pihak-pihak telah menandatangani suatu perjanjian bertulis di mana responden telah meletak jawatan dari penggajian perayu. Walaubagaimanapun, setelah itu responden telah menyatakan bahawa ianya telah tidak meletak jawatan dengan sukarela tetapi telah dibuang kerja
- c* tanpa sebab-sebab yang adil dan munasabah. Dia kemudiannya telah membuat representasi kepada Ketua Pengarah Perhubungan Perusahaan. Ianya telah dirujuk oleh Menteri kepada Mahkamah Perusahaan untuk didengarkan dan setelah Mahkamah Perusahaan telah mendengarkan kesemua keterangan, ia telah menolak tuntutan responden. Mahkamah Perusahaan telah memutuskan
- d* bahawa oleh kerana responden telah menandatangani perjanjian dengan sendirinya, maka sekarang ianya diestopkan dari mengatakan bahawa dia telah menandatangani secara paksa.

- e* Responden yang tidak puas dengan award terhadapnya telah memohon untuk *certiorari* untuk membatalkan award tersebut dan untuk *mandamus* untuk memindahkan perkara tersebut ke Mahkamah Perusahaan untuk perbicaraan semula. Pesuruhjaya Kehakiman telah membenarkan permohonan tersebut dengan menyatakan bahawa Mahkamah Perusahaan telah salah dalam menggunakan doktrin estoppel terhadap responden. Peguam telah menghujahkan bahawa Pesuruhjaya Kehakiman telah bertindak melebihi peranannya dalam
- f* prosiding pengkajian kehakiman. Dia menghujahkan bahawa mahkamah yang mendengarkan suatu *certiorari* tidak boleh menggunakan kuasa rayuan.

Diputuskan:

Oleh Gopal Sri Ram HMR

- g* [1] Kes ini tidak termasuk dalam prinsip kuasa terhad bahawa mahkamah tidak boleh menggunakan prosiding *certiorari* sebagai cara mendengarkan rayuan terhadap keputusan fakta. Malah kes ini termasuk dalam pengecualian prinsip yang tersebut di atas iaitu: (a) di mana pergantungan ke atas keputusan fakta yang salah dengan sendirinya bertentangan terhadap prinsip
- h* ketaksahan ataupun ketidakmunasabahan; (b) di mana tidak terdapatnya keterangan untuk menyokong suatu keputusan, maka tentunya terdapat kesalahan undang-undang dalam keputusan yang didapati.

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- [2] Mahkamah Perusahaan harus membicarakan representasi-representasi yang dirujuk kepadanya tanpa merujuk kepada peraturan-peraturan teknikal seperti estoppel, penepian dan persetujuan. Dalam kes ini, Mahkamah Perusahaan telah merujuk kepada doktrin estoppel untuk menegah responden daripada menegaskan bahawa dia telah dibuang kerja tanpa sebab yang adil ataupun munasabah. Maka dengan itu, Pesuruhjaya Kehakiman adalah betul dalam memutuskan bahawa award Mahkamah Perusahaan mengandungi kesalahan undang-undang setakat itu. a
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- [3] Jikalau perintah untuk menghantar dan mendengar kembali kes itu dikekalkan, suatu kelewatan yang selanjutnya akan berlaku yang akan bertentangan dengan niat Parlimen bahawa pertikaian perindustrian harus diselesaikan dengan cepat. Maka ini merupakan kes yang sesuai untuk mengubah perintah yang dibuat oleh Pesuruhjaya Kehakiman. c
- [4] Dalam memutuskan bahawa keputusan fakta-fakta Mahkamah Perusahaan adalah salah, Pesuruhjaya Kehakiman akan berhak untuk membuat keputusan khas bahawa responden telah dibuang kerja tanpa sebab yang adil dan yang munasabah. d

[Rayuan ditolak.]

Cases referred to:

- Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 (**refd**) e
- Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh* [1997] 2 CLJ 11 (**refd**)
- Nadarajah & Anor v. Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506 (**refd**)
- R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (**foll**) f
- Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 (**foll**)
- Tamil Nesan (M) Sdn Bhd v. K Ganesan (unreported)* (**refd**)
- William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235 (**dist**)
- For the appellant - T Thavalingam; M/s Shearn Delamore & Co* g
- For the respondent - LG Seah; M/s Lobo & Assoc*
- [Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-136-95]
- Reported by Mariette Peters-Goh & Gan Peng Chiang h

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*a***JUDGMENT****Gopal Sri Ram JCA:***b*

This appeal has been brought against the order of the High Court at Kuala Lumpur made on 1 August 1997 whereby *certiorari* was issued quashing the award of the Industrial Court which had been delivered on 26 July 1995. The brief facts and background are as follows.

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The respondent was at all material times employed by the appellant as a production and maintenance manager. By a letter dated 1 August 1992, the appellant purported to terminate the respondent's services by giving him three months notice. Later, on 15 October 1992, the parties entered into a written agreement under which the respondent resigned from the employment of the appellant. Since both these documents are of some importance, they are reproduced in full below.

*d***Private And Confidential**

Hj Mohd Ison B Baba
No 10 Jalan SS 15/5E
47200 Subang Jaya
1st August 1992

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The General Manager
Swedish Motor Assemblies Sdn Bhd
Jalan Bicu
Shah Alam

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Dear Sir,

Notice of Termination of Service

I wish to terminate my services earlier than my due retirement date if the Company would give me mutually acceptable and adequate compensation in consideration of my services from 2nd Sept, 1975.

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On the basis of the above, this letter serves as my formal three (3) month's notice for termination of service.

Best regards.

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Yours sincerely,
(Signed)
Hj Mohd Ison B Baba.

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Next, the agreement, which is in the following terms:

AGREEMENT

An Agreement made this 15th day of October, 1992 between Swedish Motor Assemblies Sdn. Bhd, Jalan Bicu, 40000 Shah Alam hereinafter referred to as the Company on one part and Tuan Hj Mohd Ison bin Baba, NRIC 4099718 of No 10 Jalan SS 15/5E, 47200, Subang Jaya hereinafter referred to as the Executive, on the other part.

WHEREAS the Executive had on 1st August, 1992 tendered his formal three (3) month's written notice, hereinafter referred to as the Notice to resign from the services of the Company and the Company had duly accepted the Notice, it is HEREBY AGREED as follows:-

1. The resignation takes effect from the expiry date of the Notice, i.e. 1st November 1992.
2. Subject to due income tax clearance by the Department of Inland Revenue, a Volvo 740 GLE 1990 year model Registration No BDC 2932 will be transferred to the Executive free of charge, however any income tax payable to be paid by the Executive. The Company will also cover the Executive under the existing SMA Group Insurance up till the 18th of September 1993 at the Company expense.
3. The above compensation is paid by the Company to the Executive, without any admission of liability by the Company due to the mutually agreed early retirement of the Executive.
4. The Executive hereby acknowledges due acceptance of the above terms and he has no further claims of whatsoever nature against the Company in connection with his employment or in any way arising out of or in the course of his employment in the Company.
5. The Executive further acknowledges and declares the payment made to him above is in FULL and FINAL DISCHARGE of all claims he has or may have against the Company of whatsoever nature.

IN WITNESS whereof the parties hereto have set their hands the day and year first written.

Signed by the said Executive: (signed)
In the presence of: (signed)

Signed for and on behalf of
Swedish Motor Assemblies Sdn. Bhd: (signed)
In the presence of: (signed)

- a** Later, the respondent took the position that he had not voluntarily resigned but had been dismissed without just cause or excuse. He made representations to the Director General of Industrial Relations. These were subsequently referred by the Honourable Minister to the Industrial Court for adjudication.
- b** The Industrial Court after hearing evidence dismissed the respondent's claim. In its award, it evaluated the evidence led by both sides and came to the following conclusion:
- Since he (the respondent) said he had signed the agreement in CO 1 at p. 3 on his own accord he is estopped from saying he signed it under duress later
- c** ...
- The respondent being dissatisfied with the award made against him applied for an order of *certiorari* to quash it and for *mandamus* to have the matter remitted to the Industrial Court for re-hearing. The learned judicial commissioner who heard the application acceded to it on two broad grounds.
- d** The first appears in the passages of his judgment at pp. 12 to 16 of the Appeal Record. This is what he said:
- In making the award, the learned Chairman of the Industrial Court had framed two issues which he said at Page 44 of the record had to be determined –
- e** (a) whether the Claimant (Applicant) was forced to resign by COW1 and the Managing Director of the Company and
- (b) whether he was given mutually acceptable and adequate compensation.
- f** With regard to the issue (a) above, the learned counsel for the applicant listed four findings of the Industrial Court which according to her are not supported by evidence. The findings are:
- (i) He (Applicant) alleged that CO1 page 1 was prepared for him to sign but in the Court's opinion it does not matter who prepared it so long as having admitted by him he signed it on his own accord.
(page 93 of record).
- g** (ii) The Claimant had admitted that he signed the agreement on his own accord and therefore how could he come back to say that he had been threatened to sign the agreement and was under duress.
(page 96 of record)
- h** (iii) Since he said he had signed the agreement in CO1 page 3 on his own accord, he is estopped from saying that he signed it under duress later.
(page 97 of record)
- i** (iv) He had also admitted in Court that he had signed the agreement freely and on his own accord.
(page 100 of record).

Counsel for the Applicant submitted that the notes of evidence in Enclosure 6 does not record any evidence of the Applicant having admitted that he had signed the resignation letter and agreement on his own accord. There was however, no submission in reply on this point by learned counsel for the Respondent. After perusing the Applicant's testimony, I with respect, agree with the Applicant's counsel submission. There is nothing in the evidence to show that the Applicant ever said that he did sign the documents on his own accord. Neither is there evidence to support the finding that 'His evidence on a balance of probabilities that he did not know what he signed.' On the contrary, there is evidence to say that the Applicant had read the document before he signed when he said at page 16 paragraph C in Enclosure (6): 'I had read it carefully before I signed.' But under cross-examination by counsel for the Respondent at page 15 paragraph C in Enclosure (6) he replied: 'I did not sign voluntarily.' This piece of evidence cannot be ignored. With such evidence before the Court, the findings of the learned Chairman cannot be said to be reasonable and justified. It is the duty of the Industrial Court to scrutinize the evidence before it with utmost care and to do that, it must at all times keep itself alert to the issues and attend to matters it is bound to consider (*Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC). It is obvious in this case that the Industrial Court had failed to investigate and analyse the facts properly before him. Had he done so, his conclusion would have been different. To find that the Applicant had signed the documents on his own accord without supporting evidence is indeed perverse. By such finding the Industrial Court had acted on an incorrect basis of facts on an issue which goes to the very crux of the Applicant's case, i.e. whether the Applicant had voluntarily resigned or was dismissed. Therefore, there is a clear error of jurisdiction committed by the Industrial Court when it made the findings which are contrary to the recorded evidence. Accordingly, the findings are perverse. (see *Malayan Banking Berhad v. Association of Bank Officers Peninsular Malaysia & Anor* [1988] 3 MLJ 43). That disposes of grounds (i) and (ii) above.

Before us, Mr. Thavalingam argued with great persuasion that the learned judicial commissioner exceeded the role assigned to him in judicial review proceedings. Counsel has submitted that a court hearing *certiorari* is not entitled to exercise appellate power. In support of this submission, he refers and relies on the judgment of this Court in *William Jacks & Co. (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235. There, when delivering the judgment of this Court, I said:

It is well-settled that a court cannot utilise *certiorari* proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision on the Indian Supreme Court in *Basappa v. Nagappa* AIR [1954] SC 440 and in *Dharangadhra Chemical Works Ltd v. State of Saurashtra & Others* AIR [1957] SC 264.

- a** In response to this proposition, Mr Sivabalah refers us to the decision of this Court in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79 and the decision of the Federal Court in *Rama Chandran (supra)*. I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself.

- b** The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *Rama Chandran and Amanah Butler (supra)* may be, it does not include the review, in *certiorari* proceedings, of findings of fact based on the credibility of witnesses.
- c**

Whilst having heard that passage being read in court this morning, I wish it had been more happily worded, that statement is one to which I nevertheless adhere.

- d** The present case does not in my judgment fall within the restrictive purview of the observations made in *William Jacks & Co. (M) Sdn Bhd v. S. Balasingam (supra)*. It is, as correctly submitted by Miss L.G. Seah, counsel for the respondent, a matter that falls within the exception to that rule as formulated by Edgar Joseph Jr, FCJ in the landmark decision of the *Federal Court in R. Rama Chandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 MLJ 145 at p. 224. The judgment of his Lordship which contains all the learning on the subject sets out the proposition as follows:
- e**

- f** Secondly, the dissenting judgment has made the point that it is not open to this court to find that the Employee has been dismissed from service without just cause or excuse, as this was a question of fact for the Industrial Court by virtue of the Industrial Relations Act 1967.

This point appears to be supported by what Lord Brightman said in *R v. Hillingdon LBC, ex p Puhlhofer* [1986] AC 484 at p. 518D-E:

- g** Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of the fact to the public body to whom Parliament has entrusted the decision-making power ...

- h** However, like most principles, there are important exceptions, which tend to blur the conceptual distinction between errors of law and fact. Two of these exceptions which are relevant to the present case must be mentioned; they are:

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(1) Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374. Indeed, in *R v. Hillingdon LBC, ex p Puhlhofer* (ibid), Lord Brightman made this clear by adding to the passage in his judgment cited above, ‘save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.’

(2) Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v. Bairstow* [1956] AC 14; *Din (Taj) v. Wandsworth LBC* at p. 664H, per Lord Wilberforce; *R v. Hillingdon LBC ex p Islam (Tafazzul)* [1983] 1 AC 688 at p. 708D, per Lord Wilberforce and at p. 717G, per Lord Lowry).

But, as Wade and Forsyth *Administrative Law* (7th Edn, 1994) have correctly pointed out (at p. 312):

‘No evidence’ does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allinson v. General Council of Medical Education and Registration* [1894] 1 QB 750 at pp. 760, 763; *Lee v. The Showmen’s Guild of Great Britain* [1952] QB 329 at p. 345), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. (see *R v. Roberts* [1908] 1 KB 407 at p. 423). This ‘no evidence’ principle clearly has something in common with the principle that perverse or unreasonable action is unauthorized and *ultra vires*.

As I have said, our conclusion that the Employee had been dismissed from service without just cause or excuse was arrived at as a result of reviewing the Award not only for process but also for substance and, in my view, came within the range of the two exceptions aforesaid.

Based on the foregoing passage, I am unable to agree with the submission of Mr. Thavalingam on the point under discussion. The learned judicial commissioner in the present case embarked on an inquiry which he was entitled to do. This is not a case where *certiorari* was used to cloak the exercise of appellate power.

The second ground on which the learned judicial commissioner issued *certiorari* was that the Industrial Court had erred in law by invoking the doctrine of estoppel against the respondent.

That the Industrial Court should adjudicate upon the representations referred to it without hearkening to technical rules such as estoppel, waiver, acquiescence etc. is a principle settled beyond dispute. The decision of Eusoff Chin J, (now CJ) in *Nadarajah & Anor. v. Golf Resort (M) Sdn Bhd* [1992] 1 MLJ 506 and that of Mohd Yusof, J in *Tamil Nesan (M) Sdn Bhd v. K.*

- a* Ganesan (unreported) which are authorities for the proposition I stated a moment ago were upheld by the Federal Court in *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11.

b There is no doubt that in the present case, the Industrial Court did in truth resort to the doctrine of estoppel to preclude the respondent from asserting that he had been dismissed without just cause or excuse. The learned judicial commissioner was accordingly correct in holding that the award of the Industrial Court contained an error of law to this extent. By reason of the decision of this court in *Syarikat. Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 and all the jurisprudence that has flowed thereafter, the distinction between errors of law going to jurisdiction and errors of law that do not, has ceased to exist. The learned judicial commissioner was therefore entirely correct in issuing *certiorari* to quash the award on this ground alone.

- d* My conclusion that the learned judicial commissioner did not fall into error in this case does not put an end to the matter. There remains the question whether this court ought to permit so much of the order as remits the case to the Industrial Court to stand. It is now well settled that this court even when it dismisses an appeal is entitled to make consequential orders to achieve complete justice. See *Harris Solid State (M) Sdn Bhd & Ors. v. Bruno Gentil s/o Pereira & Ors.* [1996] 4 CLJ 747; *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11.

f As I earlier said, the reference in the instant case was made on 28 August 1993 and the award handed down on 26 July 1995. In my judgment, if the order to remit and re-hear the case is permitted to stand, a further delay will be occasioned. This cuts across the spirit and intent of the Industrial Relations Act 1967 by which Parliament intended speedy resolution to industrial disputes. I am therefore in agreement with the submission of Miss L.G. Seah that this is an appropriate case to vary the order made by the learned judicial commissioner. I am unable to accede to the submission of Mr. Thavalingam that the matter should remain in the form contained in the order of the learned judicial commissioner. As I have said, it will only occasion further delay.

h The question now arises what sort of relief this court ought to formulate. It is clear from the judgment of the learned judicial commissioner that he found the Industrial Court's conclusion on the facts to be perverse. He would have been of course entitled to proceed a step further, based on *Rama Chandran (supra)* to make a specific finding that the respondent had been dismissed without just cause or excuse. I am equally inclined to do that. But I am not

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inclined to grant any remedy to the respondent since this court is not seised with all the relevant facts that touch upon the remedy. I therefore propose to make the following orders: *a*

- (1) The appeal is dismissed;
- (2) The order of *certiorari* is affirmed; *b*
- (3) The order remitting the case for re-adjudication by the Industrial Court be and is hereby set aside and there be a finding entered in favour of the respondent that he was dismissed without just cause or excuse;
- (4) That the matter be remitted to the Industrial Court to determine the appropriate remedy to be awarded to the respondent; *c*
- (5) The costs of this appeal to be taxed and paid to the respondent; and
- (6) The deposit to be paid out to the respondent to account of his taxed costs. *d*

Siti Norma Yaakob JCA:

I concur with my learned brother that this appeal should be dismissed for the reasons already given.

Denis Ong JCA: *e*

I concur.

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